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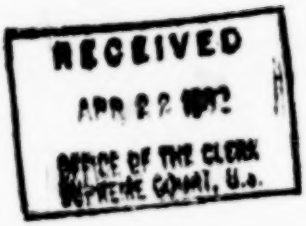
IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1982

NO.



LUIS CARLOS ARANGO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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LUIS CARLOS ARANGO,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, LUIS CARLOS ARANGO, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme court of Florida, rendered on the 8th day of April, 1982.

OPINION BELOW

The full opinion of the Supreme Court of Florida is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) to review the judgment and opinion of the Supreme Court of Florida rendered on April 8, 1982.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN EXCUSING A VENIREMAN, OVER THE DEFENDANT'S OBJECTION, WHERE THAT VENIREMAN NEVER STATED UNEQUIVOCALLY THAT HIS BELIEFS CONCERNING CAPITAL PUNISHMENT WOULD PREVENT HIM FROM SITTING AS A QUALIFIED JUROR?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the provisions of Florida law set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner, LUIS CARLOS ARANGO, has been sentenced to death by electrocution for first degree murder [Appendix A]. During the jury selection process, the trial court excused a venireman (Alvarez) for cause. The record in the case at bar reveals the following lengthy colloquy with venireman Alvarez concerning his views on capital punishment and his ability to sit as a qualified juror in this case:

MR. KAHN: I ask you to speak up, if you do. Does anybody sitting on this panel have any moral or religious beliefs that would prevent you from sitting in judgment of another person for his actions, because that's what you are doing. You are actually going to determine whether this man is guilty and should be punished appropriately, or not guilty.

That's sitting in judgment of your fellow man.

Mr. Alvarez?

JUROR ALVAREZ: I am against the death penalty.

MR. KAHN: Okay.

We are now going to get to that in a second. I want to ask you just this one question at this point. It is a first degree murder case which means you can be punished one of two ways. Number one, by the death penalty, or, in the alternative, by the Judge, who does the sentencing; not the jury, the Judge. And number two, by life imprisonment. And there are only two ways if the Court deems that it deserves the death penalty, the Judge has that final decision.

However, the jury that sits in this case makes a recommendation based on the facts in a separate proceeding, apart from guilt or innocence.

It's like a two-stage trial.

Now, would the fact that you are against the death penalty, is that feeling that you have so strong that it would even prevent you from coming back with a guilty verdict on the fact, aside from what the penalty is? Just the fact that he may get the death penalty in the end by the Judge?

JUROR ALVAREZ: I believe so.

MR. KAHN: If, in fact, the State proved its case, Mr. Alvarez, beyond and to the exclusion of every reasonable doubt, and the evidence was so overwhelming that, in fact, this man, in your mind, is guilty of first degree murder, would you be able to come back with a verdict of guilty of first degree murder with the knowledge, again, even though all the evidence is there of the charge, that the death penalty may be in the background? Not when it's a questionable situation, but where the evidence is so overwhelming that in your mind that you say, "My God, this man is guilty of first degree murder as charged." Would you still not be able to return a verdict of guilty.

JUROR ALVAREZ: I am really not sure because it conflicts with my moral beliefs.

MR. KAHN: Okay.

Let me give you one other question. I will be asking this of probably every one of you sitting on the panel.

Mr. Alvarez, do you ever foresee a set of facts that may be so heinous, so cruel and meeting all the criteria that Her Honor will instruct you is the criteria before you can recommend death, meaning a good number of those aggravating circumtances that would warrant the death penalty. Do you ever foresee a circumstance like that where you could warrant the death penalty?

JUROR ALVAREZ: Yes, it's possible.

MR. KAHN: So, there is a possibility of you recommending the death penalty in the end?

JUROR ALVAREZ: Right.

MR. KAHN: Okay. (TR I 15-17)

* * *

MR. KAHN: Now, you said you are morally opposed to the death penalty. With that in mind, would you still be able to follow his Honor's instructions on the law and disregard the consequences of your verdict? In other words, in the first phase vote just on the evidence and the crime charged, and would you be able to do that?

JUROR ALVAREZ: In the first phase I can vote on the evidence that's been presented.

MR. KAHN: Okay.

What I am saying is if the State proves the Defendant guilty beyond and to the exclusion of a reasonable doubt, are you able to vote guilty based on the law that His Honor is going to give you?

JUROR ALVAREZ: I don't believe so, sir.

MR. KAHN: You will not vote no matter what, guilty of first degree murder.

JUROR ALVAREZ: No, sir.

MR. KAHN: Is that due to the fact of the possibility of a death sentence?

JUROR ALVAREZ: Yes, sir.

MR. KAHN: Your Honor, I make the same request of Mr. Alvarez.

THE COURT: Your witness, Mr. Flynn.

MR. KAHN: Thank you, sir.

MR. FLYNN: Mr. Alvarez, I don't want to put you on the spot, sir, but could you explain why you could not decide based on the evidence whether my client is guilty of first degree murder in the first phase of the trial?

JUROR ALVAREZ: Because I am morally opposed to the death penalty. If I were to decide guilt, he would probably get the death penalty.

MR. FLYNN: Okay.

JUROR ALVAREZ: It's only if I am asked to decide if he should receive capital punishment that bothers me. It's not the determination of guilt or innocence. But, the latter part.

MR. FLYNN: Okay. The latter portion.

Do you understand from what's been said that the most your job would be would be to make a recommendation by a majority verdict to the Judge who would have the final say?

JUROR ALVAREZ: Right.

MR. FLYNN: Who could disregard your recommendation completely?

JUROR ALVAREZ: Yes, I understand that.

MR. FLYNN: What I want to be certain of is to have a jury that is a cross-section of this community to decide the guilt or innocence of my client. I take it that you have no problem understanding what the -- understanding evidence from the witness stand in this case?

JUROR ALVAREZ: No, I wouldn't have that problem.

MR. FLYNN: You strike me -- is that you have no problem understanding what the law is as the Judge instructs you on the law. Do you think that being in that situation and knowing, as I have indicated before, that there is not going to be any plea to a jury or find the man not guilty because of the death penalty? There's not going to be any of that that you could, in the first phase, fairly and objectively decide whether or not the Government has proven my client guilty beyond a reasonable doubt of first degree murder or any other crime?

JUROR ALVAREZ: Yes, I would be able to.

MR. FLYNN: Okay.

I take it then, it's the second phase that gives you problems.

JUROR ALVAREZ: Yes.

MR. FLYNN: Would it be fair to say that you would be, because of your moral objections to the death penalty be hard put to recommend the death penalty for most any situation?

JUROR ALVAREZ: Yes, sir.

MR. FLYNN: Okay.

Now, Her Honor will not just if it ever gets that far, Her Honor will not just ask you all to go back there and reach a recommendation. What Her Honor would do would give you some guideline, what they call aggravating circumstances and mitigating circumstances to consider. So, it wouldn't be just a blind recommendation based on belief or disbelief in the death penalty. It would be a reasoned decision based on guidelines.

Do you think that if the guidelines strongly enough indicated the death penalty, that even though you personally are morally opposed to the death penalty, you could accept and listen to the viewpoits of fellow jurors who might recommend the death penalty?

JUROR ALVAREZ: I think so.

MR. FLYNN: Okay.

And do you think at this point at least, you could keep an open mind so that under some set of facts, because you don't know any of the facts yet.

JUROR ALVAREZ: Right.

MR. FLYNN: Under some set of facts, perhaps your fellow jurors could even persuade you that under the law in this case the death penalty was the appropriate recommendation from the jury?

JUROR ALVAREZ: Under certain facts, yes, I could.

MR. FLYNN: Okay.

I have no further questions.

Thank you.

THE COURT: Let me ask you this question: Could you make an impartial and fair determination of the Defendant's guilt of first degree murder based upon the evidence that you have heard, based upon the law that I will give you and eliminate, in making that determination, your feelings against the death penalty, knowing that you will then have to decide whether the death penalty will be applicable?

JUROR ALVAREZ: Sir, Your Honor, I don't believe that I can eliminate my moral beliefs against the death penalty.

THE COURT: Juror will be excused for cause.

MR. FLYNN: Your Honor, for the record, I would object.

THE COURT: So noted.

MR. KAHN: Can I just ask him one more question?

THE COURT: Go ahead.

MR. KAHN: Would your moral beliefs against the death penalty be so overwhelming and so influential that it may affect your determination as to guilt or innocence of first degree murder?

JUROR ALVAREZ: Can you ask that question again?

MR. KAHN: This moral conviction that you say you have against first degree murder, against the death penalty, would that feeling and belief be so strong and overwhelming that it would influence your verdict regarding guilt or innocence.

JUROR ALVAREZ: It really depends on the facts of the case.

MR. KAHN: Okay.

So your statement is no, it wouldn't affect your determination of guilt or innocence?

JUROR ALVAREZ: In certain circumstances.

MR. KAHN: Okay.

If Her Honor were to instruct you that not at all should it ever influence a question of guilt or innocence, would you be able to follow that instruction completely, and not be affected by your moral belief in determining the guilt or innocence phase?

JUROR ALVAREZ: No, sir I don't believe so.

MR. KAHN: Okay.

THE COURT: Juror is excused for cause (TR I 99-105).

On July 15, 1980, after the jury had been chosen, the petitioner's trial reconvened, ultimately resulting in the Petitioner being found guilty of first degree murder and possession of cocaine.

A direct appeal was pursued to the Supreme Court of Florida, which court affirmed the judgment of conviction and sentence, finding that the record "clearly reveals that the venireman [Alvarez] could not render an impartial decision as to Appellant's guilt" [Appendix A][1] In so ruling, the Court found the case of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968) to be inapplicable to the facts of the case at bar.

Petitioner moved the Florida Supreme Court for a rehearing of the case, which petition was denied.

This timely Petition for Writ of Certiorari follows:

REASONS FOR GRANTING THE WRIT

In Witherspoon v. Illinois, 391 U.S. 510, 522 fn. 21, 88 S.Ct. 1770 (1968), this Court held that veniremen can be removed for cause only when they state, unmistakably and clearly: 1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the cause before them; or, 2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's guilt.

In a long line of decisions, this Court has consistently upheld the Witherspoon standards and has further added the caveat that no jury from which even one person has been excused on broader Witherspoon-type grounds than these may impose a death penalty or sit in a case where the death penalty may be imposed. See Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); and Davis v. Georgia, 429 U.S. 122 (1976).

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1. Although concurring in the majority opinion affirming guilt, two justices dissented from the affirmance of the death sentence, finding that "life imprisonment and not death is the appropriate penalty." [Appendix A]

In the case sub judice, a review of the colloquy between venireman Alvarez and the Court demonstrates that excusal for cause defies both logic and the law. The conviction of the instant Petitioner, if allowed to stand, can only serve to further the erosion of the Sixth and Fourteenth Amendment guarantees of trial by an impartial jury.

> THE TRIAL COURT ERRED IN EXCUSING VENIREMAN ALVAREZ FOR CAUSE, OVER THE DEFENDANT'S OBJECTION, WHERE ALVAREZ NEVER STATED UNEQUIVOCALLY AND CLEARLY THAT HIS BELIEFS CONCERNING CAPITAL PUNISHMENT WOULD PREVENT HIM FROM SITTING AS A QUALIFIED JUROR

With regard to the first prong of the Witherspoon test, venireman Alvarez' answers reveal that at no time did he make "unmistakably clear" that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial." Witherspoon, supra. To the contrary, as the above in trial underlined portions of the record indicate, venireman Alvarez, on five separate occasions affirmatively stated that under certain facts he could recommend the imposition of the death penalty (TR I 17, 103).

Thus, if the excusal of venireman Alvarez for cause in this case can be justified, it must be under the second Witherspoon standard, i.e., his views on capital punishment were such as to prevent him from being able to determine impartially the guilt or innocence of the Defendant.

The Florida Legislature, in apparent consistency with the principles of Witherspoon, has promulgated Florida Statutes §913.13, which specifically addresses the issue of jurors' beliefs concerning capital punishment, as follows:

> Jurors in capital cases--a person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case.

In construing the foregoing statute and its predecessor, Florida Statutes §932.20, the Florida Supreme Court has repeatedly held

that, before a juror may be excused for cause pursuant to Witherspoon, the record must establish with the "requisite amount of definiteness," Portee v. State, 253 So.2d 866 (Fla. 1971) that the excused juror held views which "precluded" or "prevented" him from finding the defendant guilty, Perkins v. State, 228 So.2d 382 (Fla. 1969), or that the questioning of the defendant revealed a "refusal" or "intransigent determination" not to weigh the evidence at trial as to guilt or innocence. Williams v. State, 228 So.2d 377 (Fla. 1969).

In the instant case, by no possible stretch of the imagination can it be said that venireman Alvarez' views toward capital punishment placed him within these strict legal parameters. First, logic itself refutes such a conclusion. For, as previously indicated, Juror Alvarez stated on five occasions that, under certain circumstances, he could recommend a sentence of death for a defendant convicted of first degree murder. This being so, it is difficult to understand how one could then argue logically that the prospect of the death penalty would produce an "intransigent determination" on the part of Juror Alvarez not to weigh the evidence at trial as to gult or innocence. Williams, supra.

More critical, however, is the fact that, as the record indicates, venireman Alvarez' responses to the prosecutor and the Court only went so far as to demonstrate that, in determining the Defendant's guilt or innocence, he could not "eliminate" his moral belief against the death penalty, and that these beliefs might "affect" or "influence" him in determining the defendant's guilt or innocence.

The mere fact that a juror's feelings about the death penalty might "affect" or "influence" his deliberations as to an issue of fact is an insufficient basis under Witherspoon upon which to disqualify such a juror. Adams v. Texas, ___U.S. _____, 100 S.Ct. 2521 (1980); Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), 626 F.2d 396 (5th Cir. 1980) (en banc).

Both Adams and Burns involved §12.31(b) of the Texas capital sentencing statute. Under Texas' bifurcated system, as here, at the sentencing proceeding, the jury is required to answer questions concerning aggravating and mitigating factors. If the jury under §12.31(b) answers yes to each of three questions, the Court must impose a death sentence. Otherwise, the Court must impose a sentence of life imprisonment. In both Adams and Burns, the trial court, pursuant to §12.31(b), excluded jurors who were unable to take an oath that the mandatory penalty of death or life imprisonment would not "affect" their deliberation on any issue of fact. In reversing the imposition of the death penalty, both the Adams and Burns courts held that unless it is shown that the "influence" or "affect" upon the juror is a "disabling" or "insurmountable" one, to the extent that the juror will be "unable" or "unwilling" to obey properly his or her oath, any such excusal of them would be on grounds broader than that allowed by Witherspoon and violative of the Sixth and Fourteenth Amendments to the Constitution of the United States.

In Burns, a prospective juror's improper exclusion was explained as follows:

> [T]hree times in succession Mrs. Doss stated that she did not believe in the death penalty, following with an affirmation that it would affect her deliberations on any issue of fact in the case. These are strong expresions indeed, but they fall short of unequivocal avowals disqualifying her under either aspect of Witherspoon's two-pronged test.
>
> 626 F.2d at 397-98.

What was stated by the panel opinion in Burns, supra, at 1301, concerning the failure of the record to make unmistakably clear the grounds for juror Doss' disqualification, is equally applicable to juror Alvarez' disqualification herein:

> She could have been asked whether, despite her expressed convictions, she could put her disbelief aside and do her duty as a citizen. Her answer might have been that she could. Or she could have been asked what effect the presence of a possible death sentence would have on her deliberations. Her answer might have been that she would wish to be very sure of guilt, to be thoroughly convinced, before she could find fact in such a way that the death penalty might result. Either answer would doubtless have rehabilitated her for jury service. An answer that she would not take or could not comply with the required oath not to be "affected" in her deliberations would doubtless, upon a proper definition of "affected" as meaning "disabling" or "insurmountably" affected, have clearly disqualified her. To be sure, these are mere speculations about what her answers to such questions might have been. The point is that nothing in her actual answers forecloses them. Her mere acknowledgment that the penalty would "affect" her deliberations does not do so: what candid and responsible citizen would not admit as much, could truthfully swear the proposition to be one of no concern whatever?
>
> • • •
>
> This being true, the mere reply by Mrs. Doss that the potential penalty would "affect" her is insufficient to permit her disqualification. Such an ambiguous answer spans the range of possible effects on her from a mere heightening of the seriousness with which she might approach her deliberations as a juror, through conscientious and moral dilemmas foreseen, to an utter refusal to deliberate rationally at all. More than this was required for her disqualification, and more was denied.

Thus, while the State may, consistent with Witherspoon, bar from jury service those persons whose beliefs about capital punishment would prevent them from considering impartially the defendant's guilt or innocence, in the instant case the prosecution and the trial court erroneously applied the law so as to exclude a juror whose only fault may have been "to take his responsibility with special seriousness or to acknowledge honestly that he might or might not be affected." Adams, supra, at 2529.

In Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), appellant Granviel asserted that five veniremen were improperly

excluded for cause, in violation of Witherspoon. The Fifth Circuit Court of Appeals found that, under Witherspoon, a venireman "may be excused for cause only if he is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings'", and that "the state retains the right to exclude only those veniremen who:

> ma[k]e unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.
>
> Granviel v. Estelle, 655 F.2d at 677, citing Witherspoon, 391 U.S., supra, at 522 n.21.

The Granviel panel stressed its "commitment to ensuring strict adherence to the mandates of Witherspoon, 655 F.2d at 677, citing Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980) (en banc), supra. Thus, the statements made by the venireman in the instant case should have been construed strictly in favor of allowing the venireman to remain on the jury.

Petitioner would further direct the Court's attention to Alderman v. Austin (5th Cir.), No. 80-7820 (December 11, 1981), James C. Hill, Circuit Judge. In Alderman, three potential jurors were dismissed for cause when they stated that they could vote to impose capital punishment but could not, if elected foreman, write out the verdict on the indictment and sign their name as foreman. In reversing the death sentence, the Fifth Circuit held that whether a venireman could sign, in good conscience, a verdict which would result in a defendant's execution is immaterial to jury service under Witherspoon.

In conclusion, the closing words of this Court in Adams, supra, in reversing the sentence of death, are controlling herein:

> It does not appear in the record before us that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Accordingly, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which such prospective jurors have been excluded.

CONCLUSION

The death sentence of LUIS CARLOS ARANGO is a byproduct of the growing disregard evidenced by the judicial system for the constitutional safeguards which ostensibly assure every man a fair trial by an impartial jury. This Court should neither condone nor acquiesce in the destruction of Sixth and Fourteenth Amendment guarantees.

WHEREFORE, this Court's supreme review, the final safeguard, is hereby requested.

Respectfully submitted,

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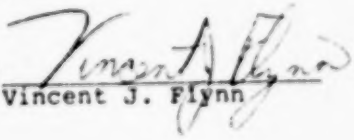
By: 
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APPENDIX

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Supreme Court of Florida

No. 59,678

LUIS CARLOS ARANGO, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[January 21, 1982]

PER CURIAM.

Arango appeals his convictions of murder in the first degree and possession of a controlled substance and his sentence of death. He alleges that the trial court committed four errors. We find, however, that only three issues raise points that warrant discussion at any length.[1] None of the issues raised require a reversal of the trial court's judgment or sentence. Hence, we affirm appellant's convictions and sentence.[2]

In March of 1980, the Dade County police received a telephone call from the manager of a Miami apartment complex reporting a disturbance. Upon their arrival, the manager reported that subsequent to telephoning he had heard what he

1. Arango also contends that a prospective juror was improperly excused for cause. The record, however, clearly reveals that the venireman could not render an impartial decision as to appellant's guilt. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

2. Jurisdiction vests under article V, section 3(b)(1) of the Florida Constitution, and section 921.141(4) of the Florida Statutes (1979).

thought was the sound of glass breaking. The police went upstairs and knocked on appellant's apartment door. A neighbor then motioned to them that some kind of activity was occurring at the other end of the apartment. Passing the front window, the officers observed cracked glass on the walkway and what appeared to be a bullet hole in the window. They knocked several times and, after receiving no response, entered through the unlocked kitchen door. Once inside, they found and detained appellant. A search of the bedroom was then conducted. On the bed lay the body of the deceased, who had an electrical cord wrapped around his neck, multiple lacerations on his face, and two gunshot wounds to his head. Cocaine, pistols, and $7,800 in cash, among other items, were seized from the premises.

The grand jury indicted appellant for first-degree murder and possession of a controlled substance. A motion to suppress evidence allegedly obtained illegally was filed and later denied, the trial judge having determined that the warrantless search was justified under the circumstances.

The jury found appellant guilty of both charges and recommended the death sentence. At the conclusion of the penalty phase of the proceeding, the trial judge found the existence of one aggravating and one mitigating circumstance and imposed the sentence of death.

Appellant first contends that the trial court erred in denying his motion to suppress evidence allegedly obtained by an illegal search and seizure. He relies on Payton v. New York, 445 U.S. 573 (1980), which held that the fourth amendment provides protection against a warrantless entry into a person's home for the purpose of making a routine felony arrest. However, the rule in Payton does apply where there are exigent circumstances. As we have made clear in our decisions, the need to protect life and to prevent serious bodily injury provides justification for an otherwise invalid entry. This exception governs here.

As we recently held in Zeigler v. State, 402 So.2d 365 (Fla. 1981), the police may enter a dwelling without a warrant

if they have credible information that a person's life may be in danger. In this case, the police acted under the reasonable belief that a person was either dead or dying inside appellant's apartment. The telephone call and subsequent report from the manager, the cracked glass and bullet hole, and the neighbor's indication of a commotion were sufficient indicia of an emergency situation. Accordingly, no warrant was required, and the motion to dismiss was properly denied.

Appellant next maintains that the instructions given to the jury impermissibly allocated the constitutionally prescribed burden of proof. At one point in the trial proceeding, the judge stated that if the jury found the existence of an aggravating circumstance, it had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances." This instruction, appellant argues, violates the due process clause as interpreted in Mullaney v. Wilbur, 421 U.S. 684 (1975), and State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

In Mullaney the Supreme Court held that a Maine law requiring the defendant to negate the existence of malice aforethought in order to reduce his crime from homicide to manslaughter did not comport with due process. Such a rule, the Court wrote, is repugnant to the fourteenth amendment guarantee that the prosecution bear the burden of proving beyond a reasonable doubt every element of an offense. In Dixon we held that the aggravating circumstances of section 921.141(6), Florida Statutes (1973), were like elements of a capital felony in that the state must establish them.

In the present case, the jury instruction, if given alone, may have conflicted with the principles of law enunciated in Mullaney and Dixon. A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existance of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence

could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances. These standard jury instructions taken as a whole show that no reversible error was committed.

Appellant also argues that the trial court erred in imposing the death penalty. One aggravating circumstance was found applicable here: the homicide was considered "especially heinous, atrocious, or cruel." § 921.141(5)(h), Fla. Stat. (1979). Appellant established in mitigation his total lack of prior criminal activity. § 921.141(6)(a), Fla. Stat. (1979). He maintains that unless we are willing to recede from earlier capital cases construing this statute, his sentence of death is disproportionate punishment. Citing to Halliwell v. State, 323 So.2d 557 (Fla. 1975), Dyan v. State, 322 So.2d 485 (Fla. 1975), and Taylor v. State, 294 So.2d 648 (Fla. 1974), he claims that we are compelled to reduce his sentence from death to life imprisonment.

Looking at the facts present here, we see that the cases cited by appellant are clearly distinguishable. In the instant case, the trial judge found that appellant beat the victim with a blunt instrument many times about the head and body. Deep cuts were made on the face, causing severe hemorrhaging. The wire used in a TV remote control device was wrapped around the victim's neck, choking him. A large towel stuffed into the victim's mouth prevented his breathing. After beating and strangling him, appellant shot the victim twice in the head.

Halliwell, on the other hand, involved a love triangle in which the appellant mutilated the body of the deceased several hours after the murder was completed. We reduced Halliwell's sentence from death to life imprisonment, holding that such conduct was not the kind contemplated by the legislature in providing for the consideration of aggravating circumstances. In the present case, the record shows that the beatings occurred prior to the murder, precisely the same factor we held in Halliwell was "relevant in fixing the death penalty." 323 So.2d

at 561.

Swan is also different because there the trial judge overrode the jury's recommendation of life imprisonment. As we have often stated, such a decision must be based on clear and convincing facts that the death penalty is appropriate. Tedder v. State, 322 So.2d 908 (Fla. 1975). The state introduced no evidence showing why Swan should be electrocuted, and the record did not demonstrate facts sufficient to satisfy Tedder.

Taylor, like Swan, involved a trial judge's rejection of a jury's recommendation of a life sentance. We reversed the sentance of death, finding that a multiplicity of factors could have influenced the jury to be lenient, including the possibility that the appellant was not the "triggerman" in the murder for which he was charged. In the case before us the jury, in view of only one mitigating circumstance, recommended death. The trial judge, after considering the totality of circumstances and exercising his reasoned judgment, adopted the jury's advisory sentance.

As we said in Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978), cert. denied, 444 U.S. 919 (1979), the death penalty statute does not contemplate "a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum." Instead, it places upon the trial judge the task of weighing all these factors. We believe that the trial court properly performed this function.

For the reasons expressed, we affirm the convictions and sentance.

It is so ordered.

SUNDBERG, C.J., ADKINS, OVERTON and ALDERMAN, JJ., Concur
McDONALD, J., Concurs in part and dissents in part with an opinion, in which BOYD, J., Concurs: "I concur in the majority opinion affirming guilt, but I concur with Justice McDonald's opinion that life imprisonment and not death is the appropriate penalty."

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

McDONALD, J., concurring in part/dissenting in part

While I concur that there was no trial error, that there was sufficient evidence to sustain the conviction, and that it was the jury's function to believe or disbelieve the defendant, I do not believe that this homicide justifies the death penalty. The trial judge predicates the imposition of the death penalty on the single aggravating factor that the crime was especially heinous, atrocious and cruel. The facts of this case do not support that finding, as we have defined it in State v. Dixon, 283 So.2d 1 (Fla. 1973), beyond a reasonable doubt. Even if they did, that single aggravating factor should not, in this case, warrant the death penalty. The defendant, a Columbian, has no past criminal record, but was a user of drugs. The deceased, also a Columbian and a friend of the appellant, was a dealer in drugs from whom the deceased had previously purchased drugs. While there is a suspicion that the parties may have been involved in a drug transaction, no one knows why this homicide was committed. Nevertheless, the circumstances fall short of showing aggravating circumstances sufficient to impose the death penalty. I would reduce the sentence to life imprisonment.

BOYD, J., Concurs: "I concur in the majority opinion affirming guilt, but I concur with Justice McDonald's opinion that life imprisonment and not death is the appropriate penalty."

An Appeal from the Circuit Court in and for Dade County

Robert M. Deehl, Judge - Case No. 80-5372

Vincent J. Flynn of Flynn, Rubio and Tarkoff, Miami, Florida,

for Appellant

Jim Smith, Attorney General and Anthony C. Musto and Joel D. Rosenblatt, Assistant Attorneys General, Miami, Florida,

for Appellee

81 6570

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1982

NO.

RECEIVED
APR 22 1982
CLERK
SUPREME COURT, U.S.

LUIS CARLOS ARANGO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Pursuant to 28 United States Code, §1915, motion is hereby made that the petitioner be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petition for writ of certiorari and a motion for leave to proceed in forma pauperis were mailed to the office of the Attorney General, The Capitol, Tallahassee, Florida 32304 this 19th day of April, 1982.

Respectfully submitted,

FLYNN, RUBIO & TARKOFF
1414 Coral Way
Miami, Florida 33145
305/858-1414

By: Vincent J. Flynn
Vincent J. Flynn

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1982

NO. 81 6570

LUIS CARLOS ARANGO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT

STATE OF FLORIDA:
ss
COUNTY OF DADE:

BEFORE ME, the undersigned authority, personally appeared VINCENT J. FLYNN, who being duly sworn, deposes and states:

1. That the Petitioner, LUIS CARLOS ARANGO, was declared indigent by the trial court judge, the Honorable Robert Deehl, prior to the initial appeal in this case.

2. The Defendant has been incarcerated since his arrest and is totally without funds.

3. An indigency affidavit has been forwarded to the Petitioner in prison and, when it is signed and returned, will also be filed with this Petition.

VINCENT J. FLYNN

Sworn to and subscribed
before me this 19th
day of April, 1982.

NOTARY PUBLIC

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES AUG 29 1984
BONDED THRU GENERAL INS. UNDERWRITERS

ORIGINAL

CASE NO. 81-6570

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

April Term, 1982

Luis Carlos Arango

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
Attorney General
State of Florida

JOHN F. ROBENALT
Assistant Attorney General
Department of Legal Affairs
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PREFACE

The Petitioner, Luis Carlos Arango was the Appellant in the Supreme Court of the State of Florida and the Defendant in the trial court. The Respondent, the State of Florida, was the Appellee in the Supreme Court of the State of Florida and the prosecution in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The symbol "A" followed by a number will refer to a portion of the Respondent's appendix.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at Arango v. State, 411 So.2d 172 (Fla. 1982).

JURISDICTION

The defendant seeks jurisdiction, of this court under 28 U.S.C. §1257(3).

CONSTITUTION AND STATUTORY PROVISIONS

The defendant in his Petition for Writ of Certiorari claims error based on the Sixth and Fourteenth Amendments of the Constitution of the United States and Provisions of the Florida law.

STATEMENT OF THE CASE

For the limited purposes of this jurisdictional brief, the State, will accept the defendant's statement of the case as representing a generally accurate description of the proceedings in the court below. In addition, State has attached and marked as Exhibit "A" the pertinent portions of the transcript of the proceedings from the Florida trial court. Page numbers of appendix are as they appear in the original transcript of the proceedings.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN EXCUSING A VENIREMAN, WHERE THE RECORD IS CLEAR THAT HIS VIEWS ON CAPITAL PUNISHMENT WOULD PREVENT OR SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HIS DUTIES AS A JUROR IN MAKING A DECISION AS TO THE DEFENDANT'S GUILT?

ARGUMENT

THE TRIAL COURT DID NOT ERR IN EXCUSING A VENIREMEN, WHERE THE RECORD IS CLEAR THAT HE COULD NOT RENDER AN, IMPARTIAL DECISION AS TO THE DEFENDANT'S GUILT.

In the case of Witherspoon v. Illnois, 391 U.S. 510 88, S. Ct. 1770, 20 L.Ed. 2d. 776, (1968). This court recognized that the State might well have the power to exclude jurors on the following narrowly drawn ground:

> "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitudes toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.
>
> Id. at 522-523, N. 21.

In the present case before the court it is unmistakably clear from the record that the Veniremen's attitude toward the death penalty would prevent him from making an impartial deicison as to the Defendant's guilt. The court having thus satisfied the second prong of the Witherspoon test, properly excluded juror Alvarez.

Juror Alvarez initially stated in response to a question as to whether he had any moral or religious beliefs that would prevent him from sitting in judgment of another person, "I am against the death penalty." (A.15). The prosecutor then explained the two stage nature of the

proceedings, the guilt stage and the penalty stage, and asked whether Juror Alvarez' feeling was so strong that it would prevent him from coming back with a verdict on the facts. (A. 15-16). Juror Alvarez replied, "I believe so." (A. 16). The prosecutor then asked whether, if the State proved its case beyond and to the exclusion of every reasonable doubt and the evidence was overwhemling, Juror Alvarez would be able to return a verdict of guilty. (A. 16-17). The response was, "I am really not sure because it conflicts with my moral beliefs." (A. 17). The next questions related to whether Juror Alvarez could foresee a circumstance in which he could recommend the death penalty and whether there was a possibility that he could do so at the end of the case. (A. 17). The juror stated it was possible. (A. 17).

Juror Alvarez was questioned again later in the proceedings. He was asked if, in the first phase of the trial, he could vote just on evidence and the crime charge (A. 99-100) and replied, "in the first phase, I can vote on the evidence that's been presented." (A. 100). The prosecutor then clarified his question to make it more specific, asking whether juror Alvarez would be able to vote guilty if the State proved its case and juror Alvarez said, "I don't believe so, sir." (A. 100). The following then transpired:

> MR. KAHN (the prosecutor): You will not vote no matter what, guilty of first degree murder?
>
> JUROR ALVAREZ: No, sir.
>
> MR. KAHN: Is that due to the fact of the possibility of a death sentence?
>
> JUROR ALVAREZ: Yes, sir.

Juror Alvarez went on, however, to say "It's not only if I am asked to decide if he should receive capital punishment that bothers me. It's not the determination of guilt or innocence. But, the latter part." (A. 101). Defense counsel subsequently asked the somewhat confusing question, "You strike me-is that you have no problem understanding what the law is as the judge instructs you on the law. Do you think that being in that situation and knowing, as I have indicated before, that there is not going to be any plea to a jury or find the man not guilty because of the death penalty? There's not going to be any of that that you could, in the first phase, fairly and objectively decide whether or not the government has proved my client guilty beyond a reasonable doubt of first degree murder or any other crime." (A.101-102). The response was, "yes, I would be able to." (A. 102). Juror Alvarez then answered questions in a manner demonstrating that although he would be "hard-put" to recommend the death penalty, uder certain facts, it was possible that he could be persuaded that the death penalty was appropriate. (A. 102-103).

The trial court than asked whether juror Alvarez could make an impartial and fair determination of Defendant's guilt, knowing that he would then have to decide whether the death penalty would be applicable. (A. 103-104). The juror replied, "Sir, Your Honor, I don't believe that I can eliminate my moral beliefs against the death penalty." (A. 104). The prosecutor then asked whether juror Alvarez' moral conviction was so strong as to influence his verdict regarding guilt or innocence and the response was that it depended on facts and circumstances of the case. (A. 104-105). Finally, the following occurred;

MR. KAHN: Okay
If His Honor were to instruct you that not at all should it ever influence a question of guilt or innocence, would you be able to follow that instruction competely, and not be affected by your moral belief in determining the guilt or innocence phase?

JUROR ALVAREZ: No, sir, I don't believe so.

Juror Alvarez stated that he could not vote guilty of first degree murder due to the possibility of the death sentence, (A. 100), that he could not eliminate his moral beliefs against the death penalty in making a determination of Defendant's guilt (A. 103-104) and that he did not believe he would be able to follow an instruction from the trial court to not allow his moral belief in influence the question of guilt. (A. 105). These statements clearly establish a basis for the exclusion of juror Alvarez, as it is apparent that his beliefs would have prevented him from reaching an impartial decision as to guilt.

The fact that juror Alvarez gave other answers which might be viewed in isolation as tending to indicate an ability to consider the question of guilt does not change the appropriate conclusion. It is apparent from considering all of juror Alvarez' statements that he could not have been impartial. It seems that his statements as to an ability to consider the evidence were probably intended to convey the fact he could consider a defendant's guilt when there was no possibility of a death sentence, but that he could not be impartial when there was such a possibility.

This court in Adams v. Texas, _____U.S._____, 100 S. Ct. 2521 ____L.Ed. 2d. _____ (1980) stated that the Witherspoon line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duty as a juror in accordance with his instruction in his oath. In applying that proposition to this particular set of facts it is clear from the entire record pertaining to juror Alvarez, that his views on capital punishment would prevent, or at the very least substantially impair the performance of his duties as a juror.

In the case of Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed. 2d. 973 (1978). This court stated hat the excusal of four veniremen who could not take the following oath to be proper under Witherspoon:

> "do you feel that you could take an oath to well and truely [sic] try this case. . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?"

The court further stated that by not taking this oath each of the excluded veniremen made it "unmistakably clear that they could not be trusted to abide by existing law and to follow conscientiouly the instructions of the trial judge." As in this case, it is just as unmistakably clear that juror Alvarez could not be trusted to abide by existing law and to follow conscientiously the instructions of the trial judge.

Even if it is said that the trial court did ruled incorrectly on the challenge for cause, reversal

should not result, as any error in this regard was harmless. In this case the state used only four peremptory challenges, (said challenges found at pages 189, 252, 274, and 282 of the transcript of the proceedings), although it had ten available. Florida Rule of Criminal Procedure, 3.350. Thus, if not excused for cause, juror Alvarez could have been, and certainly would have been, excused by the State. This issue has been raised, in this court, by Justice Rehnquist in his dissenting opinion in the case of Davis v. Georgia, 429 U.S. 122, 97, S. Ct. 399, 50 L.Ed. 2d 399 (1976).

> "...and surely Witherspoon does not decide whether the presence of unexercised peremptory challenges might render harmless the improper exclusion of a limited number of veniremen.

Finally, the State would submit, that the true issue, presented by the defendant, is soley an issue of fact. The defendant is asking this court to determine whether Juror Alvarez' statements were sufficient for his excusal as a juror, under the Witherspoon doctrine. In both Witherspoon and Adams the court was presented with a much broader issue, specifically, the validity of State Statutes that allowed the excusal of jurors for their beliefs about capital punishment. This case, as presented by the defendant, has neither shown any implication for the growth of law or the efficient administration of justice nor implication for any particular segment of society. Therefore, since the defendant has failed to present a susbstantial legal issue, the state submits this court should deny his Petition for Writ of Certiorari.

CONCLUSION

THE PETITIONER, has fail to present any matters sufficient to warrant the exercise of this court jurisdiction pursuant to 28 U.S.C. 1257(3).

Respectfully submitted,

JIM SMITH
Attorney General

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401 N. W. 2nd Avenue (Suite 820)
Miami, Florida, 33128
(305) 377-5441

AFFIDAVIT OF SERVICE

I, JOHN F. ROBENALT, Assistant Attorney General, State of Florida, after first being duly sworn according to law, depose and say:

I HEREBY CERTIFY that three copies of the Brief of Respondent in Opposition to the Petition for Certiorari were served upon the Petitioner's Attorney, Vincent J. Flynn, FLYNN, RUBIO & TARKOFF, 1414 Coral Way, Miami, Florida 33145, by mailing copies of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 23 of this Court, this 26th day of May, 1982.

JOHN F. ROBENALT, Esquire
Assistant Attorney General

SWORN TO AND SUBSCRIBED before me at Miami, Dade County, Florida, this 26th day of May, 1982.

NOTARY PUBLIC

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES JULY 31 1984
BONDED THRU GENERAL INS. UNDERWRITERS

ewl

CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

April Term, 1982

Luis Carlos Arango

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

RESPONDENT'S APPENDIX

JIM SMITH
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JUROR FRANCES JACKSON: No.

JUROR GRANT: No.

JUROR ALVAREZ: No.

JUROR BALDWIN: No.

JUROR GONZALEZ: No.

JUROR GROMADZKI: No.

JUROR PEREZ: No.

JUROR GORDON: No.

MR. KAHN: I ask you to speak up, if you do.

Does anybody sitting on this panel have any moral or religious beliefs that would prevent you from sitting in judgment of another person for his actions, because that's what you are doing. You are actually going to determine whether this man is guilty and should be punished appropriately, or not guilty.

That's sitting in judgment of your fellow man.

Mr. Alvarez?

JUROR ALVAREZ: I am against the death penalty.

MR. KAHN: Okay.

We are going to get to that in a second. I want to ask you just this one question at this point. It is a first degree murder case which means you can be punished one of two ways. Number one, by the death penalty or, in the alternative, by the Judge, who does the sentencing; not the jury, the Judge. And number two, by life

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imprisonment. And there are only two ways if the Court deems that it deserves the death penalty, the Judge has that final decision.

However, the jury that sits in this case makes a recommendation based on the facts in a separate proceeding, apart from guilt or innocence.

It's like a two-stage trial.

Now, would the fact that you are against the death penalty, is that feeling that you have so strong that it would even prevent you from coming back with a guilty verdict on the facts, aside from what the penalty is? Just the fact that he may get the death penalty in the end by the Judge?

JUROR ALVAREZ: I believe so.

MR. KAHN: If, in fact, the State proved its case, Mr. Alvarez, beyond and to the exclusion of every reasonable doubt, and the evidence was so overwhelming that, in fact, this man, in your mind, is guilty of first degree murder, would you be able to come back with a verdict of guilty of first degree murder with the knowledge, again, even though all the evidence is there of the charge, that the death penalty may be in the background? Not when it's a questionable situation, but where the evidence is so overwhelming that in your mind that you say, "My God, this man is guilty of first degree murder as charged." Would

you still not be able to return a verdict of guilty?

JUROR ALVAREZ: I am really not sure because it conflicts with my moral beliefs.

MR. KAHN: Okay.

Let me give you one other question. I will be asking this of probably every one of you sitting on the the panel.

Mr. Alvarez, do you ever foresee a set of facts that may be so heinous, so cruel and meeting all the criteria that Her Honor will instruct you is the criteria before you can recommend death, meaning a good number of those aggravating circumstances that would warrant the death penalty. Do you ever foresee a circumstance like that where you could warrant the death penalty?

JUROR ALVAREZ: Yes, it's possible.

MR. KAHN: So, there is a possibility of you recommending the death penalty in the end?

JUROR ALVAREZ: Right.

MR. KAHN: Okay.

I'd like to ask some general questions of the whole panel, and then we will get back to individual people.

Does anybody here know anybody in the, or know any law enforcement officers, anybody involved in law enforcement? Would you raise your hand?

JUROR GINSBERG: [Juror indicates.]

JUROR WHITTEN: [Juror indicates.]

JUROR JONES: [Juror indicates.]

JUROR GORDON: [Juror indicates.]

MR. KAHN: Okay. Mr. Ginsberg, do you know police officers or anybody else involved in law?

JUROR GINSBERG: Not on a close relationship, but---

MR. KAHN: Acquaintances?

JUROR GINSBERG: Some people that have come into my business.

MR. KAHN: Do you socialize with any of them?

JUROR GINSBERG: No, sir.

MR. KAHN: Any relatives of yours in law enforcement?

MR. GINSBERG: No, sir. No, sir.

MR. KAHN: Okay.

Is that Miss or Mrs. Whitten?

JUROR WHITTEN: Mrs. Whitten.

MR. KAHN: Do you have anybody who ---

JUROR WHITTEN: I have a son and a son-in-law who are law enforcement officers.

MR. KAHN: And what agency do they work for?

JUROR WHITTEN: Hialeah Police Department.

MR. KAHN: Both of them?

JUROR WHITTEN: Yes.

MR. KAHN: Do you ever discuss their cases that they may be working on or discuss the judicial system with

JUROR POWERS: No, sir.

MR. KAHN: Did you ever study law courses or anything like that while you were in school?

JUROR POWERS: No.

MR. KAHN: Criminal justice, anything like that?

JUROR POWERS: No.

MR. KAHN: Thank you, Mr. Powers.

Mr. Alvarez, how long have you lived in Dade? I am sorry?

JUROR GROMADZKI: Could I be temporarily excused? I have got some bad stomach cramps.

MR. KAHN: I have no problem. Sure.

THE COURT: Yes, you can be temporarily excused. Go into the jury room.

MR. KAHN: Go right in there.

JUROR CROOKS: In here [indicating]?

MR. KAHN: Mr. Gromadzki, you need to go to the men's room? There is a bathroom in there.

Okay, Mr. Alvarez, you work for the Legal Services as a law librarian?

JUROR ALVAREZ: Yes, sir.

MR. KAHN: How long have you been doing that?

JUROR ALVAREZ: Three years.

MR. KAHN: What did you do before that?

JUROR ALVAREZ: I was in college.

MR. KAHN: Where?

JUROR ALVAREZ: Florida State University.

MR. KAHN: And what field of study?

JUROR ALVAREZ: American Government.

MR. KAHN: Do you have a degree in Political Science?

JUROR ALVAREZ: Yes, sir.

MR. KAHN: And how long have you been living in Dade County?

JUROR ALVAREZ: Five years.

MR. KAHN: Okay.

And where did you live before that?

JUROR ALVAREZ: New York City.

MR. KAHN: Manhattan?

JUROR ALVAREZ: Well, I have been living in Florida seven years, two years in Tallahassee.

MR. KAHN: While you were going to school?

JUROR ALVAREZ: Five years here, yes.

MR. KAHN: And where in New York are you from?

JUROR ALVAREZ: Manhattan.

MR. KAHN: Is that where your family is?

JUROR ALVAREZ: No, they are here in Miami.

MR. KAHN: Were you born up there?

JUROR ALVAREZ: Yes, sir.

MR. KAHN: Now, the fact that you may know people that work in the State Attorney's Office, is that going

to influence you one way or the other as to the guilt or innocence of this man?

JUROR ALVAREZ: Not at all.

MR. KAHN: I assume you also know people that do criminal defense work, due to the nature of your job?

JUROR ALVAREZ: Yes.

MR. KAHN: Did you ever take any law courses, business law?

JUROR ALVAREZ: Yes.

MR. KAHN: What type of law courses?

JUROR ALVAREZ: Business law, administrative law, criminal justice.

MR. KAHN: Do you accept the theories behind things such as the State's burden of proof; presumption of innocence; proof beyond a reasonable doubt? You accept all those premises?

JUROR ALVAREZ: Yes, sir.

MR. KAHN: You understand that that is the basis of our judicial system?

JUROR ALVAREZ: Yes, sir.

MR. KAHN: Now, you said you are morally opposed to the death penalty. With that in mind, would you still be able to follow His Honor's instructions on the law and disregard the consequences of your veridct? In other words, in the first phase vote just on the evidence and

the crime charged, and would you be able to do that?

JUROR ALVAREZ: In the first phase I can vote on the evidence that's been presented.

MR. KAHN: Okay.

What I am saying is if the State proves the Defendant guilty beyond and to the exclusion of a reasonable doubt, are you able to vote guilty based on the law that His Honor is going to give you?

JUROR ALVAREZ: I don't believe so, sir.

MR. KAHN: You will not vote no matter what, guilty of first degree murder?

JUROR ALVAREZ: No, sir.

MR. KAHN: Is that due to the fact of the possibility of a death sentence?

JUROR ALVAREZ: Yes, sir.

MR. KAHN: Your Honor, I make the same request of Mr. Alvarez.

THE COURT: Your witness, Mr. Flynn.

MR. KAHN: Thank you, sir.

MR. FLYNN: Mr. Alvarez, I don't want to put you on the spot, sir, but could you explain why you could not decide based on the evidence whether my client is guilty of first degree murder in the first phase of the trial?

JUROR ALVAREZ: Because I am morally opposed to the death penalty. If I were to decide guilt, he would

the crime charged, and would you be able to do that?

JUROR ALVAREZ: In the first phase I can vote on the evidence that's been presented.

MR. KAHN: Okay.

What I am saying is if the State proves the Defendant guilty beyond and to the exclusion of a reasonable doubt, are you able to vote guilty based on the law that His Honor is going to give you?

JUROR ALVAREZ: I don't believe so, sir.

MR. KAHN: You will not vote no matter what, guilty of first degree murder?

JUROR ALVAREZ: No, sir.

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THE COURT: Your witness, Mr. Flynn.

MR. KAHN: Thank you, sir.

MR. FLYNN: Mr. Alvarez, I don't want to put you on the spot, sir, but could you explain why you could not decide based on the evidence whether my client is guilty of first degree murder in the first phase of the trial?

JUROR ALVAREZ: Because I am morally opposed to the death penalty. If I were to decide guilt, he would

probably get the death penalty.

MR. FLYNN: Okay.

JUROR ALVAREZ: It's only if I am asked to decide if he should receive capital punishment that bothers me. It's not the determination of guilt or innocence. But, the latter part.

MR. FLYNN: Okay. The latter portion.

Do you understand from what's been said that the most your job would be would be to make a recommendation by a majority verdict to the Judge who would have the final say?

JUROR ALVAREZ: Right.

MR. FLYNN: Who could disregard your recommendation completely?

JUROR ALVAREZ: Yes, I understand that.

MR. FLYNN: What I want to be certain of is to have a jury that is a cross-section of this community to decide the guilt or innocence of my client. I take it that you have no problem understanding what the -- understanding evidence from the witness stand in this case?

JUROR ALVAREZ: No, I wouldn't have that problem.

MR. FLYNN: You strike me -- is that you have no problem understanding what the law is as the Judge instructs you on the law. Do you think that being in that situation and knowing, as I have indicated before,

that there is not going to be any plea to a jury or find the man not guilty because of the death penalty? There's not going to be any of that that you could, in the first phase, fairly and objectively decide whether or not the Government has proven my client guilty beyond a reasonable doubt of first degree murder or any other crime?

JUROR ALVAREZ: Yes, I would be able to.

MR. FLYNN: Okay.

I take it then, it's the second phase that gives you problems?

JUROR ALVAREZ: Yes.

MR. FLYNN: Would it be fair to say that you would be, because of your moral objections to the death penalty, be hard put to recommend the death penalty for most any situation?

JUROR ALVAREZ: Yes, sir.

MR. FLYNN: Okay.

Now, His Honor will not just, if it ever gets that far, His Honor will not just ask you all to go back there and reach a recommendation. What His Honor would do would give you some guidelines, what they call aggravating circumstances and mititgating circumstances to consider. So, it wouldn't be just a blind recommendation based on belief or disbelief in the death penalty. It would be a reasoned decision based on guidelines.

Do you think that if the guidelines strongly enough indicated the death penalty, that even though you personally are morally opposed to the death penalty, you could accept and listen to the viewpoints of fellow jurors who might recommend the death penalty?

JUROR ALVAREZ: I think so.

MR. FLYNN: Okay.

And do you think at this point at least, you could keep an open mind so that under some set of facts, because you don't know any of the facts yet.

JUROR ALVAREZ: Right.

MR. FLYNN: Under some set of facts, perhaps your fellow jurors could even persuade you that under the law in this case the death penalty was the appropriate recommendation from the jury?

JUROR ALVAREZ: Under certain facts, yes, I could.

MR. FLYNN: Okay.

I have no further questions.

Thank you.

THE COURT: Let me ask you this question: Could you make an impartial and fair determination of the Defendant's guilt of first degree murder based upon the evidence that you have heard, based upon the law that I will give you and eliminate, in making that determination, your feelings against the death penalty, knowing that you will then

have to decide whether the death penalty will be applicable?

JUROR ALVAREZ: Sir, Your Honor, I don't believe that I can eliminate my moral beliefs against the death penalty.

THE COURT: Juror will be excused for cause.

MR. FLYNN: Your Honor, for the record, I would object.

THE COURT: So noted.

MR. KAHN: Can I just ask him one more question?

THE COURT: Go ahead.

MR. KAHN: Would your moral beliefs against the death penalty be so overwhelming and so influential that it may affect your determination as to guilt or innocence of first degree murder?

JUROR ALVAREZ: Can you ask that question again?

MR. KAHN: This moral conviction that you say you have against first degree murder, against the death penalty, would that feeling and belief be so strong and overwhelming that it would influence your verdict regarding guilt or innocence?

JUROR ALVAREZ: It really depends on the facts of the case.

MR. KAHN: Okay.

So, your statement is, no, it wouldn't affect your

determination of guilt or innocence?

JUROR ALVAREZ: In certain circumstances.

MR. KAHN: Okay.

If His Honor were to instruct you that not at all should it ever influence a question of guilt or innocence, would you be able to follow that instruction completely, and not be affected by your moral belief in determining the guilt or innocence phase?

JUROR ALVAREZ: No, sir, I don't believe so.

MR. KAHN: Okay.

THE COURT: Juror is excused for cause.

MR. KAHN: Thank you, Your Honor.

THE CLERK: Number 62-D, Raymond Placid.

MR. KAHN: Mr. Placid, would you state your name and the years you have been in Dade County?

JUROR PLACID: My name is Raymond Placid and I have lived here two years.

MR. KAHN: And where did you live before coming to Dade County?

JUROR PLACID: Gainesville.

MR. KAHN: Are you employed, sir?

JUROR PLACID: Yes.

MR. KAHN: What do you do?

JUROR PLACID: I am a C.P.A.

MR. KAHN: I can't hear you.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

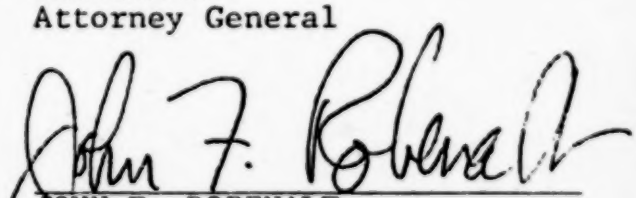
CASE NO.

LUIS CARLOS ARANGO,	:	
Appellant,	:	
vs.	:	NOTICE OF APPEARANCE
THE STATE OF FLORIDA	:	
Appellee.	:	

COMES NOW, the undersigned cousel and submit their formal Notice of Appearance on behalf of the Appellee, THE STATE OF FLORIDA, in the above referred case.

RESPECTFULLY SUBMITTED, On this 26th day of May, 1982, at Miami, Dade County, Florida.

JIM SMITH
Attorney General



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